

89-1881

No. _____

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.
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In The
Supreme Court of the United States
October Term, 1989

REV. JERRY McDONALD and
CALVARY BOYS RANCH,

~~Respondents~~-Petitioners,

vs.

STATE OF OKLAHOMA, *ex rel.*
DON ROBERTS, DISTRICT ATTORNEY
PITTSBURG COUNTY,

~~Respondent~~-Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OKLAHOMA

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Calvary Boys Ranch



QUESTION PRESENTED FOR REVIEW

Whether the courts below, in line with this Court's recent *Employment Division v. Smith* decision, should have required the State to demonstrate an overriding interest which cannot be otherwise met in regulating a religious practice, since they were considering a free exercise of religion claim which is joined with a claim of the parental right to direct the upbringing of a child.

PARTIES TO THE PROCEEDING ON REVIEW

The defendants-petitioners to the proceedings in which judgment is sought to be reviewed were:

1. Rev. Jerry McDonald, pastor of Calvary Baptist Church, an Oklahoma non-profit religious corporation, and
2. Calvary Boys Ranch, an unincorporated ministry of Calvary Baptist Church.

The plaintiff-respondent to the proceeding was State of Oklahoma, *ex rel.* Don Roberts, District Attorney Pittsburg County.

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OPINIONS DELIVERED IN THE COURTS BELOW

The order of the Oklahoma Supreme Court dismissing Defendants' petition for certiorari for *State of Oklahoma ex rel. Don Roberts, District Attorney, Pittsburg County v. Reverend Jerry McDonald and Calvary Boys Ranch, E.C. Phillips, individually and next friend of Jimmy Phillips, a minor*, is unreported, but is printed in the Appendix beginning at p. App. 9, *infra*. The Oklahoma Court of Appeals Memorandum Opinion for *State of Oklahoma ex rel. Don Roberts, District Attorney, Pittsburg County v. Reverend Jerry McDonald and Calvary Boys Ranch, E.C. Phillips, individually and next friend of Jimmy Phillips, a minor*, is reported at 787 P.2d 466, and is printed in the Appendix beginning at p. App. 10, *infra*. The Memorandum Decision of the District Court in and for Pittsburg County, State of Oklahoma, is unreported, but is printed in the Appendix beginning at p. App. 25, *infra*.

JURISDICTION OF THIS COURT

This Petition for Writ of Certiorari stems from the judgment of the Oklahoma Supreme Court filed on February 21, 1990, dismissing petition for writ of certiorari in *State of Oklahoma ex rel. Don Roberts, District Attorney, Pittsburg County v. Reverend Jerry McDonald and Calvary Boys Ranch, E.C. Phillips, individually and next friend of Jimmy Phillips, a minor*.

Supreme Court jurisdiction to review this decision is conferred in 28 U.S.C. § 1257 in that the validity of a state statute is drawn into question as being, in its application,

a violation of the First and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievance.

United States Constitution, Fourteenth Amendment, Section One:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10 Okla. Sess. Laws 1981, § 405(a):

No new child care facility may be established without the prior approval of the Department which shall be granted only after the Department is satisfied that such facility will meet known needs for the services proposed to be provided and that the facility will meet minimum standards for a license to operate. The

incorporation or domestication of a corporation organized for the purpose of operating a child care facility shall not exempt such corporation from compliance with the provisions of this act.

10 Okla. Sess. Laws 1981, § 401 *et seq.*, p. App. 1, *infra*.

STATEMENT OF THE CASE

The State of Oklahoma, *ex rel* Don Roberts, District Attorney in and for Pittsburg County, Oklahoma, petitioned the Pittsburg County Court to enjoin defendants-petitioners Reverend Jerry McDonald and Calvary Boys Ranch from maintaining and operating any child care facility in violation of the provisions of the Oklahoma Child Care Facility Licensing Act, 10 O.S. 1981 Section 401 *et seq.* The defendants answered the petition and raised as affirmative defenses the violation by the application to them of the Child Care Facility Licensing Act of their constitutionally protected rights of the free exercise of religious faith, against an establishment of religion, of freedom of association and speech, of parents to direct the upbringing of their children to whom defendants stand *in loco parentis*, of due process of law, and of equal protection of the law. On March 5, 1985, Mr. E.C. Phillips, a parent of one of the residents of Calvary Boys Ranch, moved to intervene as a defendant and filed Defendant Intervenor's Answer and Counterclaim. E.C. Phillips was permitted by the court to intervene on March 20, 1985.

On April 3, 1985, the plaintiff moved for summary judgment and filed in support thereof various exhibits and affidavits. Defendants filed a Concise Statement of Material Facts at Issue in Opposition to Plaintiff's Motion

for Summary Judgment along with various affidavits and exhibits.

On July 18, 1987, the district court issued its memorandum decision granting judgment to the plaintiff against defendants McDonald and Calvary Boys Ranch. A copy of this memorandum decision is printed beginning at p. App. 25, *infra*. Finding that the state had not answered the intervenor, the court did not grant the summary judgment as to Intervenor, E.C. Phillips. The rights of the Intervenor are, therefore, not at issue in this appeal. On September 23, 1987, the court issued its Journal Entry of Judgment Granting Permanent Injunction.

Calvary Boys Ranch and Reverend Jerry McDonald appealed this decision to the Oklahoma Supreme Court. The Supreme Court assigned the case to be reviewed by the Court of Appeals, Oklahoma City Division. On June 20, 1989, the Court of Appeals affirmed the trial court by its Memorandum Order, a copy of which is printed beginning at p. App. 10, *infra*. Rehearing of that decision was denied on July 18, 1989. Petition for writ of certiorari was filed with the Oklahoma Supreme Court, but dismissed as untimely on February 21, 1990. It is the decision of the Court of Appeals on June 20, 1989, for which certiorari was dismissed on February 21, 1990, that is the subject of this petition.

Calvary Boys Ranch is a ministry of and wholly operated by the Calvary Baptist Church of Eufaula, Oklahoma. The pastor of the Church is Rev. Jerry McDonald. The purpose of Calvary Boys Ranch is to provide religious care, religious education and religious training to the young boys who are residents at the Ranch. Neither

the Church nor the Ranch receive any public funding for the operation of the Ranch. The Ranch is wholly funded by private support.

The defendants, pursuant to their sincerely held religious beliefs, object to the requirement that Calvary Boys Ranch must be licensed by the State of Oklahoma before it may operate as a ministry of Calvary Baptist Church. Calvary Boys Ranch is premised and operated entirely upon the religious conviction that it is an integral and inseparable ministry of Calvary Baptist Church. The purpose, ministry, and function of the Ranch is primarily religious. Defendants' religious faith does not permit licensure of their church and its ministries because it would be contrary to scriptural teachings regarding the headship of Christ over the church. The State's licensing scheme requires of defendants something their faith will not permit – subjection of their church to licensure. If they do not apply for and accept a license from the state of Oklahoma, this ministry of Calvary Baptist Church is legally prohibited from operating.

REASON FOR GRANTING THE WRIT

The courts below failed to follow this court's direction in their consideration of a "hybrid" free exercise of religion and parental rights claim.

The Supreme Court established many years ago that state interference with the free exercise of religion is subject to strict scrutiny. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). While this standard has recently been limited by this Court's decision in

Employment Division v. Smith, 58 U.S.L.W. 4433 (U.S. April 17, 1990), the issues in this case fall within a "hybrid" situation still protected by the free exercise clause of the First Amendment as made applicable to the States by the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). That hybrid area is "the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school.)" *Smith*, 58 U.S.L.W., at 4436.

At issue in this case are two precious resources – children and religious autonomy. The important roles played by religion and the church in meeting the needs of society, particularly the needs of parents and their children, have traditionally been recognized and applauded in this country. In response to God's command to love their neighbors as themselves, church congregations have long been involved in

social welfare services or "good works" . . . for parishioners and others – family counseling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need.

Walz v. Tax Commission of the City of New York, 397 U.S. 664, 674 (1970).

One United States District Court has noted that "child care centers in general are relatively recent phenomena," and opined that " 'sectarian groups, in establishing day care centers, were responding to secular

economic need rather than expanding the scope of their ministries.' " *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260, 263 (4th Cir. 1988), cert. denied, 109 S.Ct. 837, 102 L.Ed.2d 969 (1989), quoting *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 661 F.Supp. 300, 309 (E.D. Va. 1987). The Fourth Circuit Court of Appeals disagreed with the district court's characterization of the child care activity of the Grace Baptist Church as secular and not religious, recognizing that "religious groups have throughout history reshaped their ministries to respond to changed circumstances." *Forest Hills*, 846 F.2d at 263. That the activity meets a need of society does not negate its religious nature or relieve the state from its constitutionally mandated duty to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

In response to an action to eliminate an exemption from licensing available for churches operating day care centers, the Fourth Circuit acknowledged that without the alternative to licensure, "some church leaders could immediately be forced to violate their convictions against submitting aspects of their ministries to state licensing, or face legal action by the state. This would be an unseemly clash of church and state which the legislature might well wish to avoid," *id.*, as it "would both chill and interfere with religious groups, enmeshing judges in intrusive and sometimes futile attempts to understand the contours, sincerity, and centrality of the religious beliefs of others." *Id.*, at 264. Therefore, the court held, if an exemption is permissible under the establishment clause in the context of employment practices in a gymnasium, one can only

be more solidly justified where it acts to prevent state interference with church programs that provide education and care for children." *Id.* (Emphasis added).

A question tangentially touched upon by the Fourth Circuit and never before addressed by this Court, except indirectly in *Pierce* and *Smith*, is whether an alternative to licensure of integral church ministries which provide religious education and care for children is not only *permissible* under the establishment clause, but *required* by the free exercise clause of the First Amendment. This is important because if an alternative is not fashioned to accommodate the religious beliefs of these petitioners, a vital ministry which is now available to assist parents in obtaining assistance in mending the broken lives of their children and in giving them religious care, education and training will be lost. The State of Oklahoma is reaping the benefits of the Calvary Boys Ranch at absolutely no cost to its taxpayers and with no allegations of any threat to the health and safety of the young people who reside there. Young boys and girls are kept off the streets and out of the legal systems of the State by the willingness of the petitioners to receive and care for children whom parents are no longer able or willing to control.

The purpose of the Bill of Rights to the United States Constitution was to protect citizens in the enjoyment of their fundamental rights and to afford them the means whereby they could challenge state action that restricts a constitutionally protected activity. The Supreme Court has warned that the protections afforded by the Constitution mean that where state action impinges upon the exercise of a fundamental constitutional right or liberty, the courts will endeavor to determine whether the state

has chosen the least restrictive alternative. Unlike most cases,

the usual presumption favoring the constitutional validity of legislation generally is not operative against statutory restriction of the preeminent freedoms secured by the first amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions.

State v. Pile, 603 P.2d 337, 340 (Okla. 1979). Accordingly, when a statute is challenged as being restrictive of a First Amendment right, particularly when it is coupled to a parental rights claim, the State must demonstrate that it is narrowly drafted so as to suppress only that activity which presents "a grave and immediate danger to the interests the state may lawfully protect." *Id.* The protections of the First Amendment do not lend themselves to summary judgment. Each prong of an analysis required by a first amendment challenge is a question of fact – not a matter of law.

The analysis of a First Amendment free exercise of religion challenge imposed by *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963) is still required when it is joined with the constitutional protection of the right of parents to raise their children in their own religious beliefs. *Smith*, 58 U.S.L.W., at 4436. Petitioners, as owners and operators of the church-operated Calvary Boys Ranch, are entitled to assert the rights of the parents who rely upon the religious education, care, and training of Calvary Boys Ranch. *Pierce*, 268 U.S. 510, 534-536.

The statute requiring the application for and obtaining of a license to operate from the State of Oklahoma is "a neutral, generally applicable law." Nevertheless, because the issues raised in this case involve not only the free exercise clause, but also the right of parents to have available to them religious care religious education, and religious training for their children, the State of Oklahoma must demonstrate that the regulation of this church ministry is pursuant to "interests of the highest order and . . . not otherwise served." *Yoder*, 406 U.S., at 215. The State may not merely rest upon the neutrality and general applicability of the statute.

It was demonstrated in this case that other states are fulfilling their interests in protecting children in residential care by means other than licensure. The State did nothing more than prove that Oklahoma has a statute. For the purpose of the "not otherwise served" inquiry into a First Amendment challenge, the state interest to be measured is generic. If one state's interest is not regarded as comparable to another state's, then the value of citizens' rights under the United States Constitution varies from the state to state. Just as a state constitution may not limit the extent of the rights of citizens under the federal constitution, neither may a state cheapen a First Amendment right by declaring that its interest in child care exceeds that of other states. If the judgment as affirmed by the Court of Appeals is allowed to stand, with no opportunity for a strict scrutiny at the relative merits of the alternative methods proposed, both as to accomplishing the state's purpose and the impact upon constitutionally protected activities, then Oklahoma has

cheapened the First Amendment right of Oklahoma citizens. If, after a full hearing on those relative merits, the courts determine that licensing is indeed the least restrictive means available for accomplishing the goals of the State, then Oklahomans may rest assured that the sanctity of their fundamental rights will at least have been given a just hearing. The First Amendment requires nothing more and nothing less.



CONCLUSION

The Court of Appeals has decided that the State of Oklahoma may require a church to obtain permission from it in order to operate a religious ministry dedicated to caring for children in a residential setting. The question of whether a State may require a church to seek State permission to operate a religious ministry to children without violating free exercise of religion and parental rights has never before been determined by this Court. Petitioners therefore respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals in this matter.

Respectfully submitted,

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OKLAHOMA STATUTES ANNOTATED
COPR.(c)WEST 1990 No Claim to Orig. Govt. Works
- TITLE 10. CHILDREN
CHAPTER 18. OKLAHOMA CHILD CARE FACILITIES
LICENSING ACT

§ 401. Purpose and policy of law – Minimum standards

(a) It is the declared purpose and policy of this act, same to be known as the "Oklahoma CHILD CARE FACILITIES LICENSING Act," to insure maintenance of minimum standards for the care and protection of children away from their own homes, to encourage and assist the child care facility toward maximum standards, and to work for the development of sufficient and adequate services for child care through joint work of public and voluntary agencies. Whenever possible, child care facilities should help to preserve and restore family life for children.

(b) In order to provide care for children in child care facilities, a license shall be obtained from the Department of Public Welfare, which is issued on the basis of meeting minimum standards which are essential for the health and welfare of the child or children placed for care with such agencies and individuals.

§ 402. Definitions

As used in this act: [FN1MV]

1. "Child" or "minor" means any person who has not attained the age of eighteen (18).

2. "Child care facility" means any public or private institution, child placing agency, foster family home, group home, day care center, or family day care home,

providing either full-time or part-time care for children away from their own homes, and which is owned or controlled by a political subdivision, a corporation, an unincorporated organization or association, or individual.

3. "Child placing agency" means a child welfare agency licensed to place children in foster family homes, group homes or adoptive homes.

4. "Full-time care" means continuous care given to a child beyond a minimum period of twenty-four (24) hours. A "foster family home" is a family home other than the parent, stepparent, grandparent, brother, sister, uncle, or aunt, which provides full-time care for five or less children; and all other such homes providing full-time care for more than five children shall be considered as "group homes". The term "day care" as used in this act shall mean the provision of care and supervision of a child who resides in its own home or with relatives but is in the care of another person for part of the day who is conducting a family day care home or persons conducting a day care center. A "family day care home" means a licensed or approved family home which provides care and protection for five or less children for part of the twenty-four-hour day. A "day care center" means a licensed or approved facility which provides care and protection of six or more children for a part of the twenty-four-hour day. These definitions of family day care home and day care center do not include informal arrangements which parents make independently with neighbors, friends, and others, caretakers in the child's own home, and do not include nursery schools, kindergartens,

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or other facilities of which the purpose is primarily educational, recreational, or medical treatment.

5. "Department" means the Department of Human Services.

6. "Commission" means the Oklahoma Public Welfare commission, the policy-making and general supervisory body of the Department.

7. "Division" means the division of the Department of Human Services of the State of Oklahoma assigned responsibilities pursuant to the provisions of the Oklahoma Child Care Facilities Licensing Act.

§ 403. Exemptions from application of act

(a) The provisions of this act shall not apply to licensed hospitals, maternity homes, to schools under the supervision of the Department of Education, the home of a child maintained by his parent, stepparent, grandparent, brother, sister, uncle or aunt.

(b) The provisions of this act shall be equally incumbent upon all private and public child care facilities. Provided, that any institution furnishing full-time care for children for ten (10) years prior to the effective date of this act shall, upon written notification to the Department, be exempted from the provisions of this act, if it is not receiving any state or federal funds for furnishing food, clothing, shelter, or upkeep for such children; and provided, further, that any institution being operated by a war veterans' organization and furnishing full-time care for children on the effective date of this act shall be

exempted from the provisions of this act, regardless of whether it is receiving state or federal funds.

§ 404 Minimum requirements and desirable standards

(a) The Department shall appoint advisory committees of representatives of child care facilities and others to prepare minimum requirements and desirable standards for adoption by the Department, provided that a majority of any committee appointed to prepare requirements and standards for institutions and homes shall be representatives of voluntary, nonprofit child care institutions and homes. These standards shall include requirements for a constructive program and services to meet the needs of each child and family; staff of good moral character and ability for child care; adequate and safe housing, sanitation, and equipment; good health care; full educational and religious opportunities; good community relationships; essential records and administrative methods; and sufficient funds for sound operation.

(b) The Department shall prescribe and publish such rules and regulations establishing minimum requirements and desirable standards as may be deemed necessary or advisable to carry out the provisions of this act.

(c) Such rules and regulations shall not be made, prescribed, or published until after consultation with the Departments of Health and Education, and the State Bureau of Investigation or other agency performing the duties of State Fire Marshal, provided, that not less than sixty (60) days' notice by ordinary mail shall be given to all current licensees before any changes are made in such rules and regulations.

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(d) In order to improve the standards of child care, the Department shall also advise and cooperate with the governing bodies and staffs of child care facilities and assist the staffs thereof through advice of progressive methods and procedures and suggestions for the improvement of services.

(e) The Department may participate in federal programs for day care services, and enter into agreements or plans on behalf of the state for such purpose, in accordance with the Act of Congress, known as the Public Welfare Amendments of 1962 (Public Law 87-543), [FN1MV] or other federal laws and regulations; and for such purpose, and notwithstanding any other provisions of this act, the Department may approve unlicensed facilities (including private homes) as meeting the standards established for licensing of day care facilities. Foster family homes, group homes, and day care homes which have been selected by and which are supervised by a licensed child care facility, and which meet the standards established for licensing under this act, may be maintained and operated on the basis of permits issued by such child care facility.

§ 405. Necessity and issuance of licenses

(a) No child care facility may be operated or maintained after June 30, 1964, unless licensed by the Department; provided, that the Department shall not be required to be licensed, but shall be bound by the standards it prescribes. No new child care facility may be established without the prior approval of the Department

which shall be granted only after the Department is satisfied that such facility will meet known needs for the services proposed to be provided and that the facility will meet minimum standards for a license to operate. The incorporation or domestication of a corporation organized for the purpose of operating a child care facility shall not exempt such corporation from compliance with the provisions of this act.

(b) An application for a license shall be made on terms provided by the Department and in the manner prescribed. Before issuing such license, the Department shall investigate the activities and standards of care of the applicant and if satisfied that the applicant meets the requirements as provided in this act, a license shall be issued. A provisional license may be issued to any applicant whose services are needed but which is temporarily unable to conform to all the rules and regulations of said Department, as provided in Section 4 hereof. [FN1MV] All licenses shall be in force for one (1) year from date of issuance unless revoked as authorized by Section 8 of this act, [FN2MV] and shall be reissued annually on application, except that a provisional license may be in force for not more than one (1) year, unless such emergency exists as, in the discretion of the Department, necessitates an extension thereof.

§ 406. Investigations and visitation

The Department shall have authority at any reasonable time to investigate and examine into the conditions of any child care facility in which a licensee hereunder receives and maintains children, and shall have authority

at any time to require the facility to provide information pertaining to children in its care. The Department of Health may visit any licensee at the request of the Department to advise on matters affecting the health of children and to inspect the sanitation of the buildings used for their care. The State Bureau of Investigation, or other agency performing the duties of State Fire Marshal, may visit any licensee at the request of the Department to advise on matters affecting the safety of children and to inspect the condition of the buildings for their care. Information obtained by the Department or Division from any licensee regarding children or their parents or other relatives shall be deemed confidential and privileged communications and shall be properly safeguarded and shall not be accessible to anyone except as herein provided unless upon order of a court of competent jurisdiction.

§ 407. Revocation of license or refusal to renew

The Department may revoke any license of a child care facility, in case the licensee shall have violated any provision of this act or the rules and regulations of said Department, as provided in Section 4 hereof. [FN1MV] No license shall be revoked or renewal refused unless the holder of such license shall have been given at least thirty (30) days' notice in writing of the grounds of such proposed revocation or refusal. If such revocation or refusal is protested within thirty (30) days of receipt of said notice by writing addressed to the Commission, said Commission, or its authorized agency, shall conduct a hearing at which an opportunity is given to said licensee to present testimony and confront witnesses. Notice of such hearing shall be given to said licensee by personal

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service or by delivery to the proper address by registered mail, at least two (2) weeks prior to the date thereof. If notice of the proposed revocation or refusal is not so protested, the license may thereupon be revoked or renewal thereof refused.

§ 409. Injunction

Any person or child care facility may be enjoined from maintaining and operating such facility for violations of any provisions of this act by suit brought in the name of the state by the Attorney General of Oklahoma or by a district attorney.

§ 410. Violations - Punishment

Any person or agent, representative, or officer of any child care facility who violates any of the provisions of this act shall, upon conviction, be deemed guilty of a misdemeanor and punished in accordance with the provisions of 21 O.S. 1961, s 10. Whenever any agent, representative, or officer of any child care facility shall be convicted under authority of this act, such conviction shall be sufficient ground for the revocation of the license of said licensee.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Wednesday, February 21, 1990

FILED FEB 21 1990

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING
ORDERS:

69,319 State of Oklahoma ex rel. Don Roberts, District
Attorney, Pittsburg County v. Reverend Jerry
McDonald and Calvary Boys Ranch, E. C. Phil-
lips, individually and next friend of Jimmy Phil-
lips, a minor.

Petition for certiorari dismissed as untimely.

CONCUR: Hargrave, C.J., Opala, V.C.J., Laven-
der, Doolin, Wilson, Kauger, Sum-
mers, JJ.

Hodges, J., with whom Simms, J.
joins, - dissenting:

I would deny certiorari.

787 P.2d 466

STATE of Oklahoma, ex rel. Don ROBERTS,
District Attorney Pittsburg County,
Appellee,

v.

Reverend Jerry McDONALD and CALVARY
BOYS RANCH, Appellants,
and

E.C. Phillips, Individually and Next
Friend of Jimmy Phillips, a Minor,
Defendant/Intervenor.

No. 69319.

Released for Publication by Order of the
Court of Appeals of Oklahoma, Division
No. 1. Court of Appeals of Oklahoma,
Division No. 1. June 20, 1989.

Rehearing Denied July 18, 1989.

Certiorari Dismissed as Untimely
Feb. 21, 1990.

State brought action to enjoin continued operation of "boys ranch" due to failure to obtain license from Department of Human Services. The District Court, Pittsburg County, Robert A. Layden, J., granted summary judgment for state, and ranch operators appealed. The Court of Appeals, Hunter, P.J., held that: (1) application of state's statutory licensing requirements to "boys ranch" operated by religious organization did not violate operators' right to free exercise of religion, and (2) state's application of statutory licensing requirements for child care facilities to "boys ranch" operated by religious organization did not violate establishment clause.

Affirmed.

[1]

228K181(15)

JUDGMENT

K. Particular cases in general.

Okl.App. 1989.

Question of whether state statute violated First Amendment's free exercise clause was question of law properly decided by summary judgment. U.S.C.A. Const.Amend. 1.

State ex rel. Roberts v. McDonald

787 P.2d 466

[2]

92K84(1)

CONSTITUTIONAL LAW

K. in general.

Okl.App. 1989.

Free exercise clause provides unqualified prohibition against government interference with religious beliefs; however, governmental regulation may lawfully impose incidental burden on otherwise protected religious conduct.

U.S.C.A. Const.Amend. 1.

State ex rel. Roberts v. McDonald

787 P.2d 466

[3]

92K84(1)

CONSTITUTIONAL LAW

K. In general.

Okl.App. 1989.

Free exercise clause cannot be understood to require state to conduct its own internal affairs in ways that comport with religious beliefs of particular citizen. U.S.C.A.

Const.Amend. 1.

State ex rel. Roberts v. McDonald

787 P.2d 466

[4]

43K3

ASYLUMS

K. Regulation and supervision.

Okl.App. 1989.

State statutes requiring operators of child care facilities to obtain license from Department of Human Services did not violate rights of operators of "boys ranch" to free exercise of religion, despite operators' contention that their failure to comply with licensing requirement was based on their religious beliefs; state's compelling interest in protecting children in child care facilities outweighed burden imposed upon operators by licensing requirement, and licensing and regulation of child care facilities was least restrictive of alternatives that state could provide for protection of children. U.S.C.A. Const.Amend. 1; 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald

787 P.2d 466

[4]

92K84.5(1)

CONSTITUTIONAL LAW

K. In general.

Okl.App. 1989.

State statutes requiring operators of child care facilities to obtain license from Department of Human Services did not violate rights of operators of "boys ranch" to free exercise of religion, despite operators' contention that their failure to comply with licensing requirement was

based on their religious beliefs; state's compelling interest in protecting children in child care facilities outweighed burden imposed upon operators by licensing requirement, and licensing and regulation of child care facilities was least restrictive of alternatives that state could provide for protection of children. U.S.C.A. Const.Amend. 1; 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald
787 P.2d 466

[5]

92K84.5(1)

CONSTITUTIONAL LAW

K. In general.

Okl.App. 1989.

To avoid violation of establishment clause, state's statutory licensing requirements for child care facility operated by religious organization would have to have clearly secular purpose, have primary effect that neither advanced nor inhibited religion, and avoid excessive government entanglement with religion. U.S.C.A.Const. Amend. 1; 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald
787 P.2d 466

[6]

43K3

ASYLUMS

K. Regulation and supervision.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities did not violate establishment clause when applied to "boys ranch" operated by religious organization; statute reflected secular purpose of protecting minor children

in child care institutions and homes, statute's primary purpose neither advanced nor inhibited religion or religious practices, and licensure requirement did not constitute excessive entanglement of government into operators' religious practices. U.S.C.A. Const.Amend. 1; 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald
787 P.2d 466

[6]

92K84.5(1)

CONSTITUTIONAL LAW

K. In general.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities did not violate establishment clause when applied to "boys ranch" operated by religious organization; statute reflected secular purpose of protecting minor children in child care institutions and homes, statute's primary purpose neither advanced nor inhibited religion or religious practices, and licensure requirement did not constitute excessive entanglement of government into operators' religious practices. U.S.C.A. Const.Amend. 1; 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald
787 P.2d 466

[7]

43K3

ASYLUMS

K. Regulation and Supervision.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities, when applied to "boys ranch" operated by religious organization, did not violate operators' freedom of association. 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald
787 P.2d 466

[7]

92K91

CONSTITUTIONAL LAW

K. Right of assembly and petition.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities, when applied to "boys ranch" operated by religious organization, did not violate operators' freedom of association. 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald
787 P.2d 466

[8]

43K3

ASYLUMS

K. Regulation and supervision.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities, when applied to "boys ranch" operated by religious organization, did not violate operators' freedom of speech. 10 O.S. 1981, ss 404(a), 405(a); U.S.C.A. Const.Amend. 1.

State ex rel. Roberts v. McDonald
787 P.2d 466

[8]

92K90.1(1)

CONSTITUTIONAL LAW

K. In general.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities, when applied to "boys ranch" operated by religious organization, did not violate operators' freedom of speech. 10 O.S. 1981, ss 404(a), 405(a); U.S.C.A. Const.Amend. 1.

State ex rel. Roberts v. McDonald
787 P.2d 466

[9]

43K3

ASYLUMS

K. Regulation and supervision.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities, when applied to "boys ranch" operated by religious organization, did not violate operators' due process rights. U.S.C.A. Const.Amend. 5, 14; 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald
787 P.2d 466

[9]

92K287.2(1)

CONSTITUTIONAL LAW

K. In general.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities, when applied to "boys ranch" operated by religious organization, did not violate operators' due process rights. U.S.C.A. Const.Amend. 5, 14; 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald.

787 P.2d 466

[10]

43K3

ASYLUMS

K. Regulation and supervision.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities, when applied to "boys ranch" operated by religious organization, did not violate operators' right to equal protection of the law. 10 O.S. 1981, ss 404(a), 405(a); U.S.C.A. Const.Amend. 14.

State ex rel. Roberts v. McDonald

787 P.2d 466

[10]

92K230.3(1)

CONSTITUTIONAL LAW

K. In general.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities, when applied to "boys ranch" operated by religious organization, did not violate operators' right to equal protection of the law. 10 O.S. 1981, ss 404(a), 405(a); U.S.C.A. Const.Amend 14.

State ex rel. Roberts v. McDonald

787 P.2d 466

[11]

43K3

ASYLUMS

K. Regulation and supervision.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities, when applied to "boys ranch" operated by religious organization, did not impinge upon operators' fundamental right to raise their children according to dictates of their faith. U.S.C.A. Const.Amend. 1; 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald
787 P.2d 466

[11]

92K82(10)

CONSTITUTIONAL LAW

K. Marriage, sex, and family; obscenity.

Okl.App. 1989.

State's statutory licensing requirements for child care facilities, when applied to "boys ranch" operated by religious organization, did not impinge upon operators' fundamental right to raise their children according to dictates of their faith. U.S.C.A. Const.Amend. 1; 10 O.S. 1981, ss 404(a), 405(a).

State ex rel. Roberts v. McDonald
787 P.2d 466

*468 Appeal from the District Court of Pittsburg County;
Robert A. Layden, Judge.

AFFIRMED.

Oscar L. Jenkins, Asst. General Counsel, Dept. of Human Services, Oklahoma City, for appellee.

Daniel John Loomis, Cleveland, Ohio, for appellants.

MEMORANDUM OPINION

HUNTER, Presiding Judge:

Upon consideration of the briefs and record in the above styled matter, the Court finds as follows:

1. Appellants seek review of the trial court's summary judgment in favor of Appellee, granting injunctive relief to Appellee pursuant to 10 O.S. 1981, s 409. The summary judgment was not applicable to the Defendant/Intervenor Phillips, and his cross-claim against Appellee is still pending before the trial court.

Appellee brought its action seeking to enjoin Appellants from the continued operation of the Calvary Boys Ranch because of their failure to obtain a license from the Department of Human Services, pursuant to 10 O.S. 1981, s 405(a). Appellants admitted their operation of the Calvary Boys Ranch without the required state license, and further stated that they refused to obtain the required license. Appellants allege that the licensing requirement was unconstitutional as applied to churches, and that the Calvary Boys Ranch was a part of, and operated by the Calvary Baptist Church. Appellee moved for summary judgment based on Appellant McDonald's deliberate operation of Calvary Boys Ranch without the required state license, and that his admission constituted a *prima facie* violation of state law, thereby entitling Appellee to the requested injunctive relief. The trial court entered its memorandum decision which made numerous findings of fact and conclusions of law and found that there were no material issues of fact between Appellants and Appellee, and that Appellee was entitled to judgment as a matter of law.

2. Appellants contend the trial court erred in finding that as a matter of law, the required state license was

not a violation of the free exercise clause contained in the First Amendment to the Constitution of the United States. Appellants allege that this is a fact question, not suitable for summary judgment.

Title 10 O.S. 1981, s 405(a) provides in part:

"No child care facility may be operated or maintained after June 30, 1964, unless licensed by the Department; No new child care facility may be established without the prior approval of the Department which shall be granted only after the Department is satisfied that such facility will meet known needs for the services proposed to be provided and that the facility will meet minimum standards for a license to operate."

Title 10 O.S. 1981, s 404(a) provides in part:

These standards shall include requirements for a constructive program and services to meet the needs of each child and family; staff of good moral character and ability for child care; adequate and safe housekeeping, sanitation, and equipment; good health care; full education and religious opportunities; good community relationships; essential records and administrative methods; and sufficient funds for sound operation."

[1] Appellants' admissions of their failure to obtain the required license, and of their intent to obtain the required license, are a clear violation of the Oklahoma Statutes. Therefore, no material issue of fact exists between the parties as to the Appellants' violation of the law. The question of whether the state statute violates the First Amendment's free exercise clause is a question of law properly decided by summary judgment.

[2] The First Amendment's free exercise clause provides that congress shall make no law "prohibiting the free exercise" *469 of religion. Appellee contends that licensing of child care facilities does not violate Appellants' right to free exercise of religion. We agree. The free exercise clause provides an unqualified prohibition against government interference with religious beliefs. However, governmental regulation may lawfully impose an incidental burden on otherwise protected religious conduct. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Appellants contend their failure to comply with the licensing requirement is based on their religious beliefs. A balancing test is employed by the courts to determine when government may regulate certain conduct prompted by religious beliefs or principles. *Yoder, supra*.

[3][4] The trial court found that Appellants' exercise of their religious beliefs is subject to the state regulation requiring licensing of the Calvary Boys Ranch. The court further found that the state had not only the right but the duty to protect its minor citizens. Further, that the state must be particularly concerned with the welfare of the children in child care facilities where young children are completely controlled by and entirely dependent upon operators and employees for all of their needs. We agree with the trial court that the Appellee does have a compelling interest in protecting the children in child care facilities such as Calvary Boys Ranch. Further, that this compelling interest outweighs the burden imposed upon Appellants by the licensing requirements.

The free exercise clause simply cannot be understood to require the state to conduct its own internal affairs in

ways that comport with the religious beliefs of particular citizens. *Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986). Appellants are requesting that the state exempt its licensing requirements for them, because of their religious beliefs. The trial court correctly refused to do so. Licensing and regulation of child care facilities are the least restrictive of the alternatives that the state could provide for the protection of children.

3. Appellants contend the trial court erred in finding as a matter of law, that the licensing requirement did not violate the establishment clause contained in the First Amendment to the Constitution of the United States. Again, Appellants argue that this question is a fact question, not suitable for summary judgment. The First Amendment's establishment clause provides that congress shall make no law "respecting an establishment of religion. . . ."

[5] The United States Supreme Court has enunciated a three-pronged test to determine whether governmental action violates the establishment clause: (1) the statute must have a secular legislative purpose; (2) the state's principle or primary effect must be one that neither advances or inhibits religion; and (3) the statute must not foster excessive governmental entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The purpose of the establishment clause is to protect against state sponsorship, financial support, and active involvement in religious activity. *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). This three-pronged test has been adopted by our Supreme Court to determine whether

required adherence to state regulations violates the establishment clause. *Tulsa Area Hospital Council v. Oral Roberts*, 626 P.2d 316 (Okla. 1981). Under the three-part test the Appellee's licensing requirements must have reflected a clearly secular purpose; have had a primary effect that neither advanced nor inhibited religion; and have avoided excessive government entanglement with religion. *Tulsa Area Hospital Council, supra*.

[6] The Application of the three-part test to Oklahoma's licensing requirements does not result in any establishment clause infringements. The statutes on their face clearly reflect a secular purpose, to protect minor children in child care institutions and homes, by requiring compliance with minimal standards for licensing. The statute's primary purpose neither advances nor inhibits religion or religious practices. The licensing requirements are regulations of *470 child care institutions for the State of Oklahoma, with the primary effect of establishing uniform minimum child care standards. The statutes have avoided excessive government entanglement with religion. We agree with the trial court's finding that simply requiring a license to operate a child care facility does not constitute excessive entanglement of the government into the religious practices of the Appellants. We further agree with the trial court's finding that the licensing requirements are not an unconstitutional entanglement, but the mere performance of a compelling state duty in protecting its minor citizens, who are in a particularly vulnerable situation without the protection of a parent.

[7][8][9][10][11] 4. Appellants contend the trial court erred in determining as a matter of law, that the requirement of licensure does not violate other fundamental

rights of Appellants. Appellants argue that the question of violation of their freedom of speech, parental rights, freedom of association, and equal protection, are all questions of fact which cannot be determined by summary judgment. This is basically the same argument as presented by Appellants in their propositions of error discussed above. The trial court found as a matter of law that the requirement of licensure did not violate Appellants' freedom of association, freedom of speech, due process, nor equal protection of the law; nor did it impinge upon Appellants' fundamental right to raise their children according to the dictates of their faith. We agree with the trial court.

5. Based on the record before it, the trial court granted summary judgment to Appellees and enjoined Appellants from operation of the Calvary Boys Ranch without a state license. The trial court found there were no material issues of fact between the parties, and that as a matter of law, the licensing requirements did not violate First Amendment Constitutional rights of Appellants. Summary judgment was formulated to allow prompt disposition of cases in which material facts are not in dispute and in which a court could decide the case as a matter of law. *Martin v. Chapel, Wilkinson, Riggs and Abney*, 637 P.2d 81 (Okla. 1981). The record supports the summary judgment entered by the trial court.

For the reasons stated above, the judgment of the trial court is AFFIRMED. HANSEN and MacGUIGAN, JJ., concur.

IN THE DISTRICT COURT IN AND
FOR PITTSBURG COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel)	
DON ROBERTS, DISTRICT)	
ATTORNEY)	
PITTSBURG COUNTY,)	C-82-576
)	
Plaintiff)	
)	(Filed July 1,
vs.)	1987)
)	
REV. JERRY McDONALD and)	
CALVARY BOYS RANCH,)	
)	
Defendants,)	
)	
and)	
)	
E. C. PHILLIPS, individually)	
and next-friend of JIMMY)	
PHILLIPS, a minor,)	
)	
Defendant-Intervenor.)	

MEMORANDUM DECISION

This matter came on for hearing on Motion For Summary Judgment filed by the State. The State appeared by Pam Padley and Neil Whittington, the defendants and intervenor appeared by Dan Loomis. The Court heard extensive argument of counsel and allowed the parties time to submit additional briefs.

In this case, the State of Oklahoma claims that defendant is a Baptist Minister operating Calvary Boys Ranch as a child care facility in Pittsburg County, Oklahoma. It is agreed by the parties that the laws of the State of Oklahoma require that child care facilities be licensed by the Department of Human Services and it is admitted by

the parties the defendant is not licensed. Defendant claims that the licensing provisions are in violation of the Constitution of the United States and the Constitution of the State of Oklahoma and that as a minister he is exempt and states that he will not comply with the licensing act.

The State of Oklahoma filed a Motion For Summary Judgment to which the defendant filed an extensive response together with a detailed brief of all of the legal issues with which this case is involved. The defendants state that regulation, per se, is not the issue in the case as defendants have no objection to health and safety regulations; defendants further state that accountability is not a central issue as the defendants agree to reasonable State inspection and agree to be held responsible for violation of any health, safety or criminal statutes or regulations. Defendants' contention is that State licensure of a church ministry is contrary to their religious beliefs and they seek a reasonable accommodation which would satisfy the State's legitimate interest without unduly burdening the defendants' free exercise of religion.

Plaintiff has filed a Motion For Summary Judgment. Under rule 13, the defendants have the burden of setting out concise written statements of the material facts which they contend are genuine issues and defendants have submitted what they contend are approximately 65 issues of fact. Plaintiff is entitled to Summary Judgment if it can show there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. In considering a Motion For Summary Judgment the Court cannot consider the credibility of the witnesses, the weight of the evidence nor make any decision of fact. If inferences are to be drawn from the underlying facts

contained in the material submitted, the Court is obligated to view them in the light most favorable to the defendant and if there is doubt as to the existence of a genuine issue of material fact, the doubt must be resolved in favor of the defendant.

While the State has the burden of proving its case, under the facts agreed to by the defendants the Court must find that the State law requires a child care facility to be licensed by the Department of Human Services, that the defendant, Calvary Boys Ranch, is not licensed, refuses to obtain a license, that the State is entitled to an injunction on violation of the state law. The State has presented a *prima facie* case for injunction.

In defense the defendants first set out a series of issues of fact concerning the defendants' sincerely held beliefs. The plaintiff does not contest these particular issues and for the purposes of this motion the Court accepts the defendants' statements on all of these issues as true. The next series of issues of fact relate to the State creating a burden on religious beliefs and the Court finds these are basically questions of law. It is undisputed that the constitution prohibits the State from interfering with the religious beliefs of its citizens – that is an unqualified prohibition; however, it is likewise undisputed that the State has a right to interfere with the religious conduct or the *exercise* of religious beliefs where that conduct conflicts with the proper statutes and regulations of the state. The question here is whether the *exercise* of the defendants' religious beliefs is subject to state regulation.

The defendants set out issues of fact on whether the State has a compelling interest in this matter. The Court

finds that is a question of law and without question the State has not only the right but the duty to protect its minor citizens. The state must be particularly concerned with the welfare of children in child care facilities where young children are completely controlled by, and entirely dependent upon, operators and employees for all of their physical, mental and emotional needs. Defendants inquire how the State can have a compelling interest in licensure of child care facilities when they do not require a license for those facilities operated by the Department of Human Services. This question is repeated in several different ways and is argued extensively by the defendants. The Court is of the opinion that to suggest the State has no right to license anybody if it fails to license itself is a frivolous argument. Defendants ask the question: Does licensure insure the health and safety of children in child care facilities? This is not a question of fact for the Court as obviously licensure does not "insure" although it may aid the health and safety of children in child care facilities. Defendants agree that the state has a right (and perhaps will even agree that the state has a duty) to inspect the premises of child care facilities, to require compliance with various fire and safety codes. In effect the defendants argue that the State has a right to intervene "after the fact" but may not require prior licensure which is an attempt to assure protection of children and reduces the chances of mistreatment.

The defendants set out issues of fact to the effect that State licensure would inhibit religion and would constitute excessive entanglement between the State and religion. The State argues that if the State required licensure of non-religious child care facilities but exempted

the religious facilities this would be an *advantage* to the non-religious facilities and would be in effect an advancement of religion, contrary to the constitution. The Court is not persuaded by this argument of the State and if the argument were valid it would constitute a question of fact as to whether the financial result in the particular case with which we are involved would be sufficient to be an advantage to the exempt child care facility. On the other hand, the Court does not find these regulations inhibit the religion of the defendants as they explained that they have cooperated with the fire marshal and have spent money to comply with various State requirements in regard to health and safety. The Court finds as a matter of law that simply requiring a license to operate a child care facility does not constitute excessive entanglement of the government into the religious practices of the defendants; it is correct that the licenses would be in effect for one year and would be reissued annually on application but that is not a burdensome requirement, nor should it create confrontation or conflicts. Defendants are correct that it requires the state to be involved in details of administration and to perform necessary duties of investigation and visitation but the Court holds that is not an unconstitutional entanglement, that is merely performance of a compelling State duty in protecting its minor citizens who are in a particularly vulnerable situation without the protection of a parent.

The Court holds as a matter of law that the requirement of licensure does not violate the constitutional rights of the defendant, Rev. Jerry McDonald and Calvary Boys Ranch, nor the other defendants' rights with regard to freedom of association, freedom of speech, due process

nor equal protection of the law; nor does it impinge upon defendants' fundamental right to raise their children according to the dictates of their faith. The State is not substituting its own choices and decisions as to care and supervision over those of the parents and the State does have, as pointed out before, a compelling State interest in the welfare of its minor citizens.

The defendants make a particularly strong argument that licensure is not the least drastic alternative to fulfill the state compelling interest and that a question of fact exists as to whether less restrictive measures are available to the state. The defendants suggest as questions of fact that the State interest may be safeguarded by enforcement of health and fire safety laws as well as criminal child abuse laws, that utilization of the oversight authority of the Oklahoma Commission of Children and Youth and the Office of Juvenile System Oversight provide less restrictive methods of protecting the rights of juveniles. Defendants also suggest that other states are able to protect the health and safety of children without licensure. The State argues that the licensure is not a drastic measure and is the only way to meet the minimum standards to assure health, safety and well being of children, that data must be obtained through visitation and investigation of the facilities pursuant to the licensure law. Obviously, the purpose of licensure is to attempt compliance with minimum standards *before* harm is done. The State has a right to demand that certain standards are met and the license is simply a recognition and a certification of acceptance and compliance. As far as due process is concerned, certainly a child care facility could not have a

license refused nor a license revoked without an opportunity for hearings, appeal and a full presentation of all its due process rights.

The Court finds there are no material issues of fact between the plaintiff and the defendants. The Court holds that plaintiff is entitled to judgment as a matter of law.

IT IS ORDER OF THE COURT that Summary Judgment is granted to the plaintiff, the State of Oklahoma, against the defendants and the Court orders that injunctive relief be granted pursuant to 10 O.S. 1981, §409.

The Court finds that the state has not filed a reply to the answer of the intervenor, E. C. Phillips, nor has it filed an answer to his cross-claim. Therefore, the order granting Summary Judgment will have no application to intervenor Phillips. However, the Court finds that the intervenor does not have a constitutional right for a particular child care facility to be available to him and to operate without a license. The Court will make no ruling in connection with intervenor until the state has responded to his pleadings or the intervenor requests default judgment. However, the Court will not hold up its ruling with reference to the Calvary Boys Ranch and plaintiff is directed to prepare a Journal Entry of Judgment pursuant to this Memorandum Decision. Exceptions allowed to all parties.

App. 32

DATED THIS 30th day of June, 1987.

/s/ Robert A. Layden
ROBERT A. LAYDEN,
DISTRICT JUDGE

cc: Neil Whittington
Pam Padley
Daniel Jon Loomis
Fred Wendel

JUN 29 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1881

In The
Supreme Court of the United States
October Term, 1989

REV. JERRY McDONALD and
CALVARY BOYS RANCH,

Petitioners,

v.

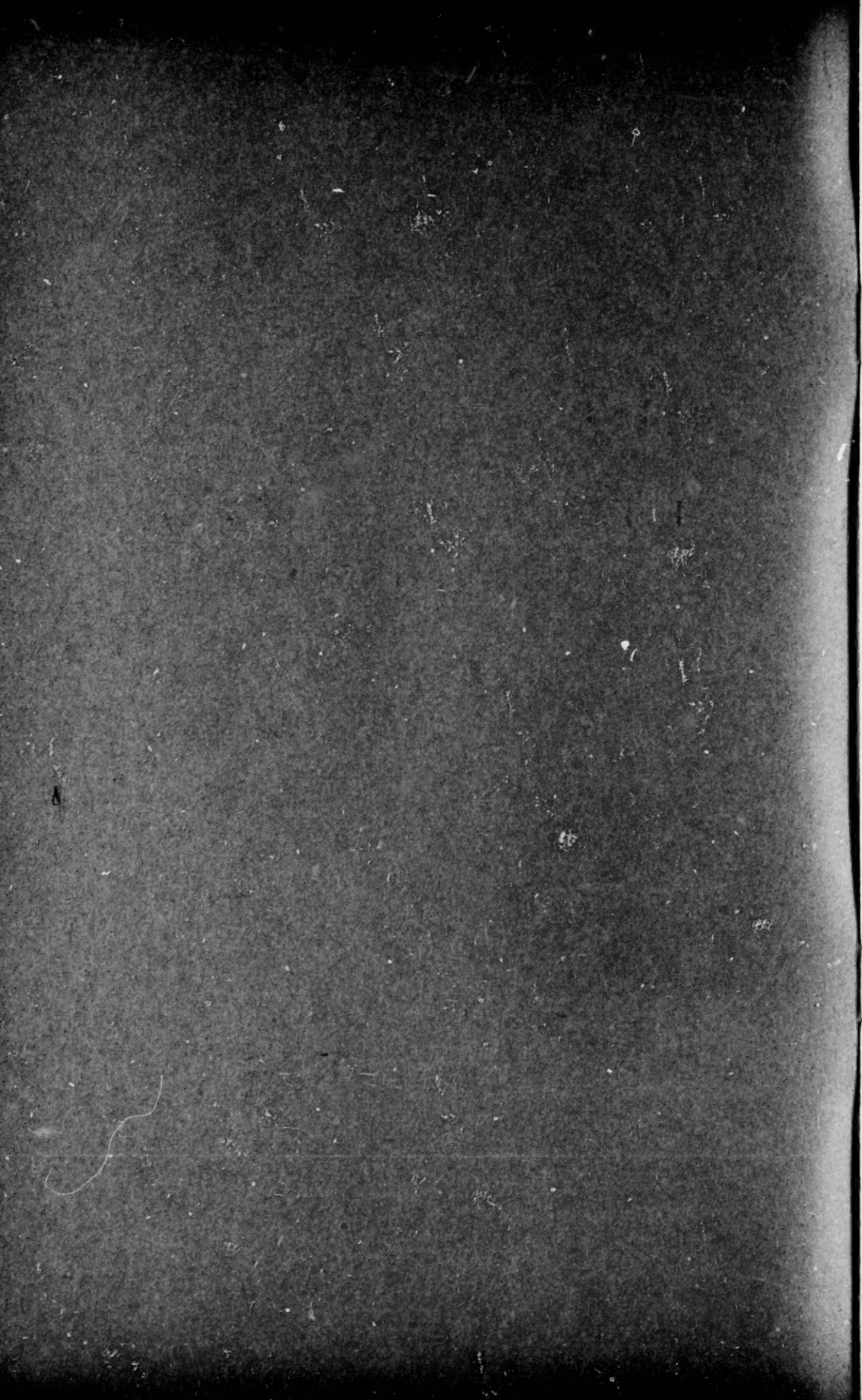
STATE OF OKLAHOMA, ex rel.
DON ROBERTS, DISTRICT ATTORNEY
PITTSBURG COUNTY,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OKLAHOMA

*JOHN G. FEARS
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State of Oklahoma
Department of Human Services
P. O. Box 53025
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**Counsel of Record for Respondent*



QUESTIONS PRESENTED

Respondent rejects the Petitioners' characterization of questions presented. They should be stated as follows:

1. Whether Petitioners' failure to timely appeal to the state court of last resort, the Oklahoma Supreme Court, renders this Petition jurisdictionally defective under Rule 10.1, Supreme Court Rules, and 12 U.S.C. § 1257 for lack of a final decision?

2. Whether the Dismissal for untimely filing issued by the Oklahoma Supreme Court was an adequate state ground obviating any necessity to review alleged federal claims?

3. Whether Petitioner has insufficient standing to assert a "parental right" claim under the Ninth Amendment previously argued in trial court by Intervenor parent, and, further, while trial Court Intervenor's appeal of such claim remains unresolved in Oklahoma Court of Appeals?

4. Whether an alleged federal "parental right" claim is ripe for discretionary review since at least two Oklahoma appellate courts may still resolve claim through pending appeal by state court intervenor parent?

5. Whether the state statute, 10 O.S. § 401, et seq., which requires licensure of, and is generally applicable to, all Oklahoma child care facilities is valid if such law incidentally requires an act (i.e., application for a license) forbidden by Petitioners' personal religious beliefs?

PARTIES TO THE PROCEEDINGS

The Respondent is correctly named and described in the Petition for Writ of Certiorari.

The Court's attention, however, is respectfully directed to a separate pending appeal pursued by one of the parties in the trial court, Defendant-Intervenor, E.C. Phillips, individually and next friend of Jimmy Phillips, a minor. Mr. Phillips is the parent of the minor. (See, Petition for Writ of Certiorari, App. at 31)

The Trial Court Defendant-Intervenor is not a party to this Petition, but is pursuing a separate appeal still pending in the Oklahoma Court of Appeals (No. 71.501). He is, however, represented in the state appellate court by counsel for these Petitioners. (See Resp. App., at 1)

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No. 89-1881

In The
Supreme Court of the United States
October Term, 1989

REV. JERRY McDONALD and
CALVARY BOYS RANCH,

Petitioners,

v.

STATE OF OKLAHOMA, ex rel.
DON ROBERTS, DISTRICT ATTORNEY
PITTSBURG COUNTY,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OKLAHOMA**

Respondent respectfully requests that the Petition for Writ of Certiorari to review either the Order of the Oklahoma Supreme Court or Oklahoma Court of appeals be denied.

OPINIONS BELOW

Opinions and Orders of various Oklahoma courts are accurately cited by Petitioners, and are included in

Petitioners' Appendix (hereinafter, Pet. App.). There are, however, two additional orders that will be discussed in the following text. First, Petitioners should have included an Order dated August 18, 1988, by Chief Justice Doolin of the Oklahoma Supreme Court denying consolidation of Defendant Intervenor Phillips' appeal (#71,501) with the separate appeal of Petitioners (#69,319). This Order is reprinted in Respondent's Appendix (hereinafter, Resp. App.) at p. 1. Second, the Court's attention is directed to an Order dated May 15, 1990, by current Chief Justice Hargrave transferring trial court Intervenor's pending appeal to the Oklahoma Court of Appeals. (Resp. App., at 2).

JURISDICTION

Respondent unequivocally asserts that Petitioners failed to properly invoke this Court's jurisdiction for discretionary review under 28 U.S.C. §1257(a) or Rule 10.1. Supreme Court Rules. The Oklahoma Supreme Court dismissed Petitioner's State court appeal as untimely. (Pet. App., at 9) Consequently, there is no *final* decision as to any federal questions by the state court of last resort.

Petitioners' attempt to argue a Ninth Amendment "parental right" claim is also jurisdictionally deficient. That issue is currently before the Oklahoma Court of appeals by virtue of the trial court Intervenor's separate appeal. Notwithstanding a lack of standing by Petitioners, that federal issue is not "ripe" for review until a

final decision is rendered by the Oklahoma Supreme Court.

STATEMENT OF CASE

The Petitioners' Statement, as contained in the petition, does not sufficiently elaborate on all relevant orders and events. Respondent submits the following additional Statement relevant to this Court's inquiry into the instant petition.

1. The Oklahoma Supreme Court by Order dated February 21, 1990, denied Petitioners' state Petition for Writ of Certiorari as untimely. Under Rule 3.14(G), Rules of the Oklahoma Court of Appeals, the Petitioners had twenty (20) days from July 18, 1988, the date rehearing was denied by the Court of Appeals (See Resp. App., at 8), in which to file a petition for Writ of Certiorari with the Oklahoma Supreme Court.

2. Petitioner failed to file its petition until two (2) days after the deadline. The rule explicitly states that the "time for such application shall not be extended." Therefore the Oklahoma Supreme Court dismissed due to a jurisdictional time bar. This was an "independent and adequate" state ground. The Oklahoma Supreme Court was the state court of last resort under Oklahoma law. 20 O.S. §30.1, *et seq.*

Because of the jurisdictional defect, the Oklahoma Supreme Court neither considered, nor ruled upon, Petitioners' alleged federal questions. There is no final

decision of federal issues by the court of last resort. Petitioners did not address these factors.

3. Of equal importance to the consideration of the Petition herein, is the effect of a separate and prior order by the Oklahoma Supreme Court. By Order dated August 18, 1988, consolidation of an appeal by the trial court intervenor with that of Petitioners was denied (Resp. App., at 1). Contrary to the Petitioners' view (See Petition, at 9), the alleged "parental right" claim under the Ninth Amendment to the U.S. Constitution remains unresolved by the Oklahoma Supreme Court. The trial court Intervenor, the parent of a minor residing at Calvary Boys Ranch, continues to assert in the unresolved State appeal (#71,501) the identical Ninth Amendment issue of parental authority which Petitioners curiously attempt to argue before this Court. (Resp. App., at 4).

Notwithstanding Petitioners' highly questionable standing to assert a federal "parental right" claim without guardianship or court ordered custody of the children residing at Calvary Boys Ranch, neither the Oklahoma Court of Appeals nor the Oklahoma Supreme Court have had an opportunity to rule on that and other federal issues (Resp. App., at 4-7). Moreover, this Respondent remains a party in that appeal.

4. Petitioner at no time objected to or argued against, intervention in the trial court by Intervenor Phillips. Furthermore, counsel of record for Petitioners has omitted any reference to, or explanation of, their legal representation of Intervenor, and, equally critical, counsels' presentation of Intervenor's Ninth Amendment "parental right" claim in the unresolved State appeal.

Consequently, the Petitioners' attempt to combine a federal Ninth Amendment claim with an alleged First Amendment "Free Exercise Clause" claim is defective. Only the parents or guardians of the minors may pursue such a claim.

Even if one were to presume that Petitioners possessed requisite standing, the Ninth Amendment claim is not "ripe" for review absent a final decision by the Oklahoma court of last resort. Jurisdiction is lacking not only under 28 U.S.C. §1257(a), but also Rule 10.1. Supreme Court Rules.

5. As the Petitioners essentially conclude under these circumstances (Pet., at 10), a First Amendment, "Free Exercise" claim cannot survive absent a "hybrid" situation as required under this Court's recent decision in *Employment Division Department of Human Resources of Oregon, et al., Petitioners v. Alfred L. Smith, et al.*, 58 L.W. 4433. Petitioners also concede that the Oklahoma Child Care Facilities Licensing Act, 10 O.S. §401 *et seq.*, is a "neutral, generally applicable law" requiring an act (licensure) which only incidentally affects Petitioners' religious beliefs. (Pet., at 10)

The Statute in no manner inquires into religious beliefs. Petitioner fails to discuss, or even observe that the legislation applies to private and non-profit entities alike whether owned by secular or religious organizations. The statute's plain language simply addresses the health, safety, and general welfare concerns normally associated with protection of minor children residing in facilities away from their parents.

Without question, the State is free to regulate and protect minor children who are vulnerable to, and totally

dependent upon, residential facility employees. Petitioners omitted any reference to Chief Justice Scalia's statement that the Court has never held that personal religious views excuse conformance with an otherwise valid law concerning conduct that the State is free to regulate. *Id.* at 4435.

In the instant appeal, Petitioners did not assail the statute's provisions as being directed specifically at religion or religious views. Rather, they assert that the mere act of "applying" for a license subverts their beliefs. Such pale assertions do not rise to the level of a claim under the Free Exercise Clause. Petitioners have additionally failed to offer or discuss any relevant decisions of this Court which remotely suggest that the acts of applying for, or maintaining, a license for child care facilities under these facts is violative of First Amendment rights.

THE COURT SHOULD DENY THE PETITION FOR CERTIORARI

The Petitioners' State Court appeal was appropriately dismissed as untimely by the Oklahoma Supreme Court. (Pet. App., at 9). The instant petition should be denied due to lack of a final decision by the State court of last resort.

The State order of dismissal resulted in there being no reviewable final decision as to federal issues. Such ruling, however, was also an independent and adequate state ground. (See Section A, *infra*.) As the following discussion succinctly illustrates, there is also a total failure by Petitioners to present a ripe Ninth Amendment

"parental right" claim. That federal question remains unresolved in the Intervenor's pending state appeal involving this Respondent.

Finally, the alleged First Amendment Free Exercise Claim does not involve a "hybrid" situation as discussed in the *Oregon* opinion, *Id.*, at 4436. Thus, the "neutral, generally applicable" Oklahoma child care licensing statute is valid since it only incidentally requires an action, obtaining a license, which is at odds with Petitioners' religious views.

A. THERE IS NO FINAL DECISION BY THE STATE COURT OF LAST RESORT

In delineating this Court's discretionary authority to entertain a petition for writ of certiorari, 28 U.S.C. § 1257(a), requires that there be a final decision by the State court of last resort. Numerous decisions of this Court have further defined this finality requirement, and they are pertinent here.

In *Radio Station WOW v. Johnson*, 326 U.S. 120, 124, this Court noted that the Supreme Court should only intervene in State Court proceedings after the "highest state court in which a decision could be had" has ruled on the federal question. The Petition in this instance, however, is jurisdictionally deficient. Petitioners failed to timely appeal an adverse decision by the Oklahoma Court of Appeals as required by Rule 3.14(G). That rule clearly stated that no extensions would be allowed. As a direct consequence, there is no final decision by the State Court of last resort, the Oklahoma Supreme Court, and jurisdiction is defective.

In dismissing a petition under Section 1257, this Court has held that "no jurisdiction exists unless a federal question has been both raised and decided in the state court below." *Illinois v. Gates*, 462 U.S. 213, 218 (1983). Without question, no federal issues were raised or decided under the Order of dismissal. Absent the arguments and rulings appearing on the record, jurisdiction fails. *Id.*, at 2321.

A lack of certiorari jurisdiction under Section 1257 was similarly the basis for dismissing a petition improvidently granted in *Hamerstein v. Superior Court of California*, 341 U.S. 491 (1951). In that case, this Court held that failure to utilize proper state review procedures was fatal. *Id.*, at 492. More directly on point, the longstanding position of this Court has been that failure to timely appeal within the State appeals process results in deficient jurisdiction. *Chesapeake & Ohio Railway Co. v. McDonald*, 53 L.ed 963, at 965 (1909); *See also, Newman v. Gates*, 204 U.S. 385, 390 (1907). There has been no qualification of this position on state procedural holdings with the very limited exception of federal habeas corpus. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Otherwise, a State rule requiring timely actions has been held sufficient and also an "adequate and independent state law ground." *Id.*, at 81-82.

The purpose of Rule 3.14(G) is clearly designed to encourage timely pursuit of significant cases or risk a loss of further review. Petitioners were aware that no extensions were authorized. The State's policy of limiting crowded dockets to issues of great importance is obvious. Petitioners failure to comply cannot be ignored, and finality is wholly lacking under Section 1257. Petitioners'

avoidance of this question in the Petition further illustrates their lack of concern, or disdain for, the importance of finality.

B. THE OKLAHOMA SUPREME COURT HAS NOT RESOLVED AN ALLEGED NINTH AMENDMENT "PARENTAL RIGHT" CLAIM.

Petitioners failed to inform the Court that the trial court Intervenor is currently pursuing the same Ninth Amendment claim in a pending State appeal (Resp. App., at 5). Moreover, this Respondent remains a party to that appeal. As this Court is aware, Intervenor Phillips is a parent of a minor residing at Calvary Boys Ranch. Both Intervenor Phillips' appeal and this Petition arose from the same trial court action involving this Respondent. (Pet. App., at 25) The Oklahoma Supreme Court, however, has not resolved that claim since the state court refused to consolidate the appeals. Consequently, there is no final decision on the Ninth Amendment "parental right" claim.

Although neither the Reverend McDonald or Calvary Boys Ranch have standing to assert a "parental right" claim, that federal question is not ripe for review until the Oklahoma Supreme Court addresses and resolves the claim in the pending appeal of Intervenor Phillips.

This Court has often noted the need to avoid entertaining federal questions when remaining litigation may resolve the issue in state appellate courts. *Radio Station WOW, Id.*, at 127. In *Costareli v. Massachusetts*, 421 U.S. 193 (1975), moreover, this Court explicitly stated that only final decisions of the state court of last resort should be

reviewed. Additionally, that policy is specifically designed to preclude review of issues, as in the instant Petition, that "may be unresolved" in the state courts. *Id.*, at 196. Absent, final resolution in the state court, the court lacks jurisdiction. *Id.*, at 197.

The pending appeal was recently assigned to the Oklahoma Court of Appeals. (Resp. App., at 2) Therefore, the State could review the Ninth Amendment question first in the intermediate appellate court, and then again on certiorari to the Oklahoma Supreme Court. Finally, counsel for Petitioners were aware of this situation since they represent Intervenor in the pending state appeal. (Resp. App., at 4).

One of the primary purposes of finality under section 1257 is to avoid piecemeal litigation. *North Dakota St. Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). One cannot envision a more appropriate case where avoiding "fragmentary review" is required. *Radio Station WOW*, *Id.* at 127. The decision in the Intervenor's State appeal will directly affect this Respondent and the state statute, 10 O.S. § 401, *et seq.*, as written and enforced. No scenario or reason exists in support of hearing Petitioners' alleged Ninth Amendment "parental right" claim.

C. THERE IS NO HYBRID COMBINATION OF FIRST AND NINTH AMENDMENT CLAIMS

The Petitioners' attempt to describe a "hybrid" set of federal claims to invoke the recent *Oregon* decision is without merit. Respondents have no reviewable Ninth Amendment "parental right" claim to join with an alleged

Free Exercise Clause violation. Given the Petitioners' concession that the State Statute is a "neutral, generally applicable" licensure law (Pet., at 10) which only incidentally affects their religious views, there is no basis for asserting a violation of the Free Exercise Clause, *Department of Human Resources of Oregon*, Id. at 4435.

Citing *United States v. Lee*, 455 U.S. 252 (1983), the Court in the *Oregon* case held that personal religious beliefs do not exempt an individual from complying with, for example, a neutral law such as the Oklahoma statute which is applied generally to all child care facilities regardless of secular or religious ownership. The State licensure Statute neither inquires into religious beliefs, nor is directed at religion. It protects all minor children in terms of health, safety, and general welfare. Minors are extremely vulnerable when solely dependent for care on persons other than parents. This is a valid, longstanding area of state regulation. The incidental requirement that Petitioners apply for, and maintain, a license does not offend the First Amendment.

CONCLUSION

As the preceding discussion demonstrates, there are no federal issues of constitutional dimension that are before this Court. This Court should deny the Petition for Writ of Certiorari for the reasons stated.

Respectfully submitted,

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June 29, 1990

App. 1

IN THE SUPREME COURT OF THE STATE
OF OKLAHOMA

Thursday, August 18, 1988

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING
ORDER:

71,496 – STATE OF OKLAHOMA ex rel. COMMISSION-
ERS OF THE LAND OFFICE V. THE CITY OF
STILLWATER, a municipality, et al.

Dismissal motion contained in August 12, 1988
response to petition in error is deferred pend-
ing merits adjudication.

(71,501 – STATE OF OKLAHOMA, ex rel. DON
ROBERTS, DISTRICT ATTORNEY PITTSBURG
COUNTY V. REV. JERRY McDONALD et al.

(69,319 – STATE OF OKLAHOMA, ex rel. DON
ROBERTS, DISTRICT ATTORNEY PITTSBURG
COUNTY V. REV. JERRY McDONALD et al.

Court notes motion for consolidation of these
two appeals. However, consolidation does not
appear appropriate at this time since case No.
69,319 is fully at issue and was assigned to the
Court of Appeals June 21, 1988, whereas the
instant appeal was filed August 9, 1988, with
notice of completion of record not due until
January 19, 1989, followed thereafter by brief-
ing.

71,416 – STANLEY D. REISS V. ELSIE M. REISS, NOW
ELSIE M. SCOTT

Court notes counter-petition in error filed
August 9, 1988, does not reflect on its face that
it is timely under Rules of Appellate Procedure
in Civil Cases, 12 O.S., Ch. 15, App. 2, Rule
1.18. Appellee/counter-petition in error should
not be dismissed. Attached to the response

App. 2

should a certified copy of the order of the trial court being challenged in the counter-appeal. Response due not later than September 7, 1988.

- 70,019 - SALES MATES, INC., an Oklahoma corporation, et al. v. THE ESTATE OF CHARLES ARTHUR ELDER, P-85-182, BEVERLY ELDER, Personal Representative

Motion to stay appellate proceedings, filed August 10, 1988, essentially calls for an indefinite extension of briefing time. Appellant is granted until September 12, 1988, in which to file the brief in chief, and no further extensions are contemplated. In the event of a resolution below of the issues currently on appeal, as mentioned as a possibility in the motion, appellant may file a dismissal of this appeal.

/s/ Bill B. Doolin
CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE
OF OKLAHOMA

IT IS HEREBY ORDERED that the following case(s) be and hereby is(are) assigned to the Court of Appeals, Tulsa Divisions:

- 71,365 (Cons. w/71,737, 71,738 & 72,504) Western Petroleum, Inc. v. Petron Energy, Inc. et al.
71,501 State of Oklahoma ex rel., Don Roberts etc. v. E. C. Phillips etc.
72,136 James W. Rosencutter and Taresa Lea Rosencutter v. Briercroft Service Corp.
71,398 (Cons. w/72,781) Cal Acree et c. v. Mohammed Hadi etc.
71,963 George Miskovsky, Sr. v. Carroll E. Gregg.

App. 3

- 72,056 Susan Davis v. Luke D. Davis.
- 73,966 David Lee Pearce v. Special Indemnity Fund et al.
- 74,071 Walter Matlock v. George E. Failing Co. et al.
- 74,107 Sport O'Kings Farms v. Randy Thomas et al.
- 73,976 Edmond Tire & Auto v. Larry Bohot et al.
- 73,907 Chester Prophet v. Vickers et al.
- 73,664 James Gregory v. Special Indemnity Fund et al.
- 73,458 John Z. Walmer v. Rockwell International et al.
- 73,383 L. D. Ford v. Rockwell International et al.
- 73,330 Patricia Mae Wolfenbarger v. Safeway Stores, Inc.

IT IS ORDERED that the Rules of Practice and Procedure in the court of Appeals and on Certiorari to the Court, 12 O.S.1981, Ch. 15, App.3, are to be followed until further order of this Court.

IT IS FURTHER ORDERED that until the Court of Appeals has made final disposition of any assigned case, any and all Motions, Petitioners for Rehearing, etc., must be filed with the Clerk of the Appellate Courts, Room 1, State Capitol Building, Oklahoma City, Oklahoma.

DONE BY ORDER OF THE SUPREME COURT this
15th day of May, 1990.

/s/ Ralph Hargrave
CHIEF JUSTICE

No. 71501
IN THE
SUPREME COURT FOR THE
STATE OF OKLAHOMA
STATE OF OKLAHOMA, *ex rel.* DON ROBERTS,
DISTRICT ATTORNEY
PITTSBURG COUNTY,

Appellee,

vs.

REV. JERRY McDONALD and CALVARY BOYS RANCH,
and

E.C. PHILLIPS, Individually
and Next-Friend of JIMMY PHILLIPS, a minor,

Appellant/
Intervenor.

On Appeal from the District Court
Pittsburg County
The Honorable Judge Robert A. Layden Presiding
Injunction and Constitutional

BRIEF OF APPELLANT/INTERVENOR

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**RULE 3.14 THE PETITION
FOR CERTIORARI - CONTENTS**

G. The petition for certiorari shall be filed with the clerk of the Supreme Court within twenty (20) days from the date the order either denying or dismissing a petition for rehearing was filed by the Court of Appeals. The time for such application shall not be extended. Petition, answer and reply shall be accompanied by ten (10) legible copies.

